

1 Peter C. Catalanotti (SBN 230743)
 2 peter.catalanotti@wilsonelser.com

3 Audrey Tam (SBN 305437)
 4 audrey.tam@wilsonelser.com

5 Inna Nytochka (SBN 354560)
 6 inna.nytochka@wilsonelser.com

7 **WILSON, ELSER, MOSKOWITZ,
 8 EDELMAN & DICKER LLP**

9 655 Montgomery Street, Suite 900

10 San Francisco, CA 94111

11 Telephone: (415) 433-0990

12 Facsimile: (415) 434-1370

13 Attorneys for Defendant,
 14 Farva Jafri, Mykola Ishchuk, and Esmeralda Famutimi

15 **UNITED STATES DISTRICT COURT**

16 **NORTHERN DISTRICT OF CALIFORNIA**

12 DAVID KLEIN,	) Case No.: 24-cv-03265-WHO
13 Plaintiff,	) ASSIGNED FOR ALL PURPOSES TO:
14 v.	) HON. WILLIAM H. ORRICK
15 FARVA JAFRI, JAFRI LAW FIRM,	) DEFENDANTS FARVA JAFRI,
16 MYKOLA ISHCHUK, ESMERALDA	) MYKOLA ISHCHUK, AND
17 FAMUTIMI, and DOES 1-20, ,	) ESMERALDA FAMUTIMI'S NOTICE
18 Defendants.	) OF MOTION AND MOTION TO
	) STRIKE PORTIONS OF THE FIRST
	) AMENDED COMPLAINT; AND
	) MEMORANDUM OF POINTS AND
	) AUTHORITIES
19)
20	) [Filed concurrently with Motion to Dismiss
	) the Complaint for Lack of Personal
	) Jurisdiction (FRCP 12(b)(2).]
21)
22	) Date: November 20, 2024
	) Time: 2:00 pm PST
23	) Dept.: Floor 17, Courtroom 2

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 **PLEASE TAKE NOTICE** that on November 20, 2024 at 2:00 pm, or as soon thereafter
3 as the matter may be heard in Courtroom 2 of the above-entitled court, located at Phillip Burton
4 Federal Building & United States Courthouse, 450 Golden Gate Avenue, San Francisco, CA
5 94102, Defendants Farva Jafri, Mykola Ishchuk, and Esmeralda Famutimi (collectively,
6 “Defendants”) will move the court to strike portions of Plaintiff David Klein’s (“Plaintiff”) First
7 Amended Complaint (“FAC”) pursuant to FRCP 12(f), on the grounds that Plaintiff’s claim for
8 emotional distress damages is redundant, immaterial, impertinent, and improper.

9 The motion will be based on this Notice of Motion and Motion, the Memorandum of
10 Points and Authorities filed herewith, and the pleadings and papers filed herein.

11
12 Dated: October 15, 2024

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP

13
14 By: 
Peter C. Catalanotti
Audrey Tam
Inna Nytochka
Attorneys for Defendant,
Farva Jafri, Mykola Ishchuk, and Esmeralda
Famutimi

15
16
17
18
19
20
21
22
23
24
25
26
27
28

MOTION TO STRIKE

Defendants Farva Jafri, Mykola Ishchuk, and Esmeralda Famutimi (collectively, “Defendants”) hereby move the court to strike portions of Plaintiff David Klein’s (“Plaintiff”) First Amended Complaint (“FAC”) pursuant to FRCP 12(f), as follows:

Paragraph 53: KLEIN was extremely distressed and upset by being subject to the huge award of fees that defendants' actions, in failing to follow his explicit instructions, caused him.

Prayer No. 2: General damages for emotional distress only on the second count.

8 This Motion is made on the grounds that under FRCP 12(f), the FAC contains
9 redundant, immaterial, impertinent, or scandalous matters, and the portions of the pleading to be
10 stricken are not drawn or filed in conformity with the laws of California, Federal Rules of Civil
11 Procedure, a court rule, or an order of the court. Plaintiff has not pled any facts that support his
12 request for emotional distress damages against Defendants.

14 | Dated: October 15, 2024

**WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP**

By: Peter C. Catalanotti
Peter C. Catalanotti
Audrey Tam
Inna Nytochka
Attorneys for Defendant,
Farva Jafri, Mykola Ishchuk, and Esmeralda
Famutimi

MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction

On March 4, 2024, David Klein (“Plaintiff”) filed a Complaint against Farva Jafri, Mykola Ishchuk, and Esmeralda Famutimi (collectively, “Defendants”), among others, for Legal Malpractice and Breach of Fiduciary Duty in San Mateo County Superior Court, Case No. 24-CIV-01370 (“CA Lawsuit”). On the same day, Plaintiff filed a Complaint with identical allegations against identical defendants in the United States District Court for the Southern District of New York, Case No. 1:24-cv-01649-AT (“NY Lawsuit”). The NY Lawsuit alleges diversity of citizenship, pursuant to 28 USC 1332(a).

Plaintiff claims damages stemming from Defendant’s alleged legal representation of Plaintiff in a defamation lawsuit that Plaintiff brought against Jelly Belly Candy Co. (“JBCC”), that was first filed in New York State Court but ultimately resulted in a judgement rendered by the Eastern California District Court against Plaintiff (“Defamation Lawsuit”).

On May 30, 2024, Defendant filed a Notice of Removal of this case to the US District Court for Northern District of California. On September 24, 2024, Plaintiff filed the operative First Amended Complaint (FAC) following this court’s granting of Defendant Mykola Ishchuk’s 12(b)(6) motion to dismiss with leave to amend.

Plaintiff’s claim for emotional damages is improper and should be stricken from the FAC because California law does not support recovery of emotional distress damages in a legal malpractice action where the loss is purely economic.

Accordingly, Defendants’ Motion to Strike should be granted without leave to amend.

2. Background

The following facts are taken directly from Plaintiff’s Complaint.

a. New York State Court

In April 2022, Plaintiff and Defendant Frava Jafri (“Jafri”) allegedly entered into an agreement in which Jafri would pursue Plaintiff’s claims against JBCC on Plaintiff’s behalf. The Complaint alleges that this is a violation of New York law. (FAC ¶7.)

On May 23, 2022, Plaintiff filed a lawsuit in New York state court. The FAC alleges that

1 the case should have been filed in Massachusetts. (FAC ¶ 8.) The lawsuit alleged three
 2 defamatory statements that caused Plaintiff damage, but two of these were beyond the statute of
 3 limitations under NY law, and the third was not actionable because it was true. (FAC ¶ 9.)

4 **b. Federal Court (Southern District of NY)**

5 JBCC removed the case to the United States District Court for the Southern District of
 6 NY based on diversity jurisdiction. (FAC ¶ 10.) The JBCC filed a motion to dismiss for failure to
 7 state a claim. (FAC ¶ 12.) Jafri did not oppose the motion, but asked the federal court for
 8 permission to dismiss the case and refile in Massachusetts. (FAC ¶ 13.)

9 **c. MA State Court and MA Federal Court**

10 On October 25, 2022, JBCC removed the Massachusetts state court case to the federal
 11 court in Massachusetts. On November 1, 2022, JBCC filed a motion to transfer the case to the
 12 Eastern District of California or, in the alternative, to dismiss the case. (FAC ¶ 17.) On December
 13 30, 2022, the court granted the motion because Plaintiff did not oppose the motion and JBCC is
 14 incorporated and headquartered in CA. (FAC ¶ 20.) After confusion over whether Plaintiff was
 15 served with the motion, the court vacated the order. The court then reentered its order on January
 16 3, 2023 and the case was transferred to the Eastern District of CA on January 6, 2023. (FAC ¶
 17 24.)

18 **d. Federal Court (Eastern District of CA)**

19 On August 26, 2022, JBCC filed a declaratory relief action against Plaintiff in the Eastern
 20 District of California, seeking declaratory relief regarding the same subject matter as brought in
 21 Plaintiff's defamation case ("Declaratory Relief Case.") (FAC ¶ 44.) Defendant Ishchuk appeared
 22 *pro hac vice* and represented Plaintiff in this action. (FAC ¶ 48.)

23 On January 20, 2023, JBCC filed an Anti-SLAPP motion. On February 3, 2023, Plaintiff,
 24 in pro per, filed an opposition. On March 7, 2023, the Anti-SLAPP motion was granted and all of
 25 Plaintiff's claims were dismissed without leave to amend.

26 Plaintiff alleges that Defendants continued to advise Plaintiff after the case was
 27 transferred to California. Plaintiff alleges that all the letters and oppositions in the case were
 28 ghostwritten by Defendants. (FAC ¶¶ 26-39.) Plaintiff's claimed damages include the monetary

1 judgement obtained by JBCC against Plaintiff for attorney's fees, and alleged emotional
 2 distress. (FAC 16:12-17.)

3 **3. Legal Analysis**

4 **a. Standard for Motion to Strike**

5 A pleading is subject to a motion to strike if it contains "insufficient defense or any
 6 redundant, immaterial, impertinent, or scandalous matter." (FRCP 12(f).) A motion to strike has
 7 also been deemed appropriate if it "will make trial less complicated or eliminate serious risks of
 8 prejudice to the moving party, delay, or confusion of the issues." (*Sliger v. Prospect Mortg.,*
 9 *LLC* (ED CA 2011) 789 F.2d 1212, 1216.) The function of a Rule 12(f) motion is "to avoid the
 10 expenditure of time and money that must arise from litigating spurious issues by dispensing
 11 with those issues prior to trial." (*Whittlestone, Inc. v. Handi-Craft Co.* (9th Cir. 2010) 618 F.3d
 12 970, 973; *Operating Engineers Local 324 Health Care Plan v. G & W Const. Co.* (6th Cir.
 13 2015) 783 F.3d 1045, 1050.)

14 The grounds for a motion to strike must appear on the face of the pleading under attack,
 15 or from matters that the court may judicially notice (e.g., the court's own files or records). (*SEC*
 16 *v. Sands* (CD CA 1995) 902 F.Supp. 1149, 1165 (citing text); *Amini Innovation Corp. v.*
 17 *McFerran Home Furnishings, Inc.* (CD CA 2014) 301 FRD 487, 489-490 & fn. 1 – judicial
 18 notice of related case appropriate in ruling on motion.)

19 **b. Plaintiff's claim for emotional distress damages is improper.**

20 Generally, an attorney's ordinary negligence in rendering professional services will not
 21 support recovery of emotional distress damages where the misconduct only causes the client
 22 economic loss or property damage. This is so whether the alleged malpractice occurs in a
 23 litigation or nonlitigation context. (*Merenda v. Sup.Ct. (Diamond)* (1992) 3 CA4th 1, 10
 24 (disapproved on other grounds by *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30
 25 C4th 1037, 1045); *see Camenisch v. Sup.Ct. (Burns)* (1996) 44 CA4th 1689, 1697 (client
 26 allegedly suffered emotional distress upon learning attorney's negligence may have thwarted
 27 client's tax avoidance goals).)

28

1 The recovery of damages for emotional distress in a legal malpractice case turns on the
 2 nature of plaintiff's interest which is harmed and not merely on the reprehensibility of the
 3 defendant's conduct. (See *Holliday v. Jones* (1989) 215 Cal. App. 3d 102, 119 [malpractice
 4 caused a criminal conviction and imprisonment].) The interest protected is typically economic,
 5 as in the loss of damages or the imposition of damages.

6 Whether recovery of damages for emotional distress attributable to legal
 7 malpractice should be allowed must be considered in light of the primary interest protected by
 8 the duty to avoid malpractice. (See *Holliday v. Jones, supra*, 215 Cal. App. 3d at 119.) Where
 9 the interest of the client is economic, serious emotional distress is not an inevitable consequence
 10 of the loss of money and the precedents run strongly against recovery. For these reasons the
 11 issue is not resolved in plaintiff's favor simply because she has pleaded an otherwise
 12 actionable claim of legal malpractice. (*Camenisch v. Superior Court* (1996) 44 Cal. App. 4th
 13 1689, 1695.)

14 Plaintiff alleges emotional distress damages for the Breach of Fiduciary Duty claim.
 15 (FAC ¶ 51-53.) Plaintiff alleges that he was "extremely distressed and upset by being subject to
 16 the huge award of fees that defendants' actions, in failing to follow his explicit instructions,
 17 caused him. (FAC ¶53.) These instructions allegedly included that "whatever steps they took
 18 after dismissing the New York action, [...Defendant should] make sure that whatever action is
 19 taken won't give [JBCC] the right to make [Plaintiff] responsible for [the JBCC's] legal fees."
 20 (FAC ¶ 14.) In fact, other than the emotional distress damages, Plaintiff's sole damages are the
 21 sum of the judgement entered against Plaintiff in the underlying Defamation Lawsuit. (FAC
 22 Prayer ¶ 1.) The damages are clearly only economic.

23 As the courts have stated, where the interest of the client is economic, serious emotional
 24 distress is not an inevitable consequence of the loss of money. (*Camenisch, supra*, 44 Cal. App.
 25 4th at 1695.) Here, Plaintiff has failed to plead any facts to show that his damages are anything
 26 more than purely economic, and that the interest which was jeopardized by the alleged
 27 malpractice is the type that would warrant an award for emotional distress damages.

28

1 Additionally, a demand for emotional distress damages is prejudicial to Defendants. It is
2 evident that Plaintiff's alleged instructions to Defendants concerned the outcome for the
3 Defamation Lawsuit, not specific actions that Plaintiff wanted his attorneys to take. In other
4 words, the instruction to, "make sure that whatever action is taken won't give [JBCC] the right
5 to make [Plaintiff] responsible for [the JBCC's] legal fees" is a demand about the outcome of
6 the Defamation Lawsuit – that it not result in an adverse judgement against Plaintiff. However,
7 it is unreasonable to impose liability for breach of fiduciary duty merely because the outcome of
8 a case was not as Plaintiff would have wished – if that were the case, then half of all lawsuits
9 would result in malpractice lawsuits. Plaintiff's claim for emotional distress as a result of an
10 unfavorable judgment entered because Plaintiff's own pursuit of a case is unreasonable.

11 Therefore, Plaintiff's prayer for emotional distress damages is improper and should be
12 stricken from the Complaint.

13 | 4. Conclusion

14 For the foregoing reasons, the Court should grant Defendants' Motion to Strike pursuant
15 to FRCP 12(f).

16 || Respectfully submitted,

17 | Dated: October 15, 2024

**WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP**

By: Peter C. Catalanotti
Peter C. Catalanotti
Audrey Tam
Inna Nytochka
Attorneys for Defendants
Farva Jafri, Mykola
Famutimi

PROOF OF SERVICE

David Klein v. Farva Jafri, et al.
Northern District of California Court Case No.: 24-cv-03265-WHO

At the time of service I was over 18 years of age and not a party to this action. I am employed by Wilson, Elser, Moskowitz, Edelman & Dicker LLP in the County of San Francisco, State of California. My business address is 655 Montgomery Street, Suite 900, San Francisco, California 94111. My business Facsimile number is (415) 434-1370. On this date I served the following document(s):

**DEFENDANTS FARVA JAFRI, MYKOLA ISHCHUK, AND ESMERALDA
FAMUTIMI'S NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF
THE FIRST AMENDED COMPLAINT; AND MEMORANDUM OF POINTS AND
AUTHORITIES**

9 on the person or persons listed below, through their respective attorneys of record in this action,
10 by placing true copies thereof in sealed envelopes or packages addressed as shown below by the
following means of service:

- 11 By United States Mail. I placed the envelope(s) for collection and mailing, following our
12 ordinary business practices. I am readily familiar with this business's practice for
13 collecting and processing correspondence for mailing. On the same day that
correspondence is placed for collection and mailing, it is deposited in the ordinary course
of business with the United States Postal Service, in a sealed envelope with postage fully
14 prepaid.

15 **BY ECF** - Pursuant to Rule 5 of the Federal Rules of Civil Procedure, on October 15,
2024, I caused the documents to be served by email or via the Court's ECF.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

EXECUTED on October 15, 2024, at San Francisco, California.

Inna Nytochka

SERVICE LIST

David Klein v. Farva Jafri, et al.
Northern District of California Court Case No.: 24-cv-03265-WHO

Carlos Jato, Esq.
LAW OFFICE OF CARLOS JATO
819 Eddy St
San Francisco CA, 94109
T: (415) 771-6174
F: (415) 474-3748
E: cjato@jato-law.com

Attorney for Plaintiff David Klein